CASE NO. 19-70092 [CONSOLIDATED WITH 19-70244, 19-70279]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL-CIO,

Petitioner, Respondent and Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Petitioner,

v.

NP SUNSET LLC, DBA SUNSET STATION HOTEL CASINO,

Respondent and Intervenor.

ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD CASE NO. 367 N.L.R.B. NO. 62, CASES 28-CA-225263

PETITIONER'S REPLY BRIEF

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I. ARGUMENT

1. The Union Challenges Only Certain Remedial Issues

The Board is correct that "this Court reviews the Board's choice of remedy for 'a clear abuse of discretion.'" *See* Board Br. 43, DktEntry 44. We think we meet that standard easily on at least the following issues.

2. Because The Board Requires Unions To Provide Copies Of Notices To Employers, It Should Require Employer To Provide Copies Of Notices To Unions

In footnote 10, the Board buries an important issue of discrimination. The Board should require, as part of its Order, that the employer provide signed copies of the Notice to the Union. We, of course, agree that the Case Handling Manual already entitles the Union to a signed copy upon request. The problem here is that the standard, usual and always enforced remedy as to unions is that they must "provide signed copies of the Notice to the Employer for posting, if it is willing to do so." *See, e.g., Local 307, Nat'l Postal Mailhandlers Union*, 367 N.L.R.B. No. 144, slip op. at 3 (June 4, 2019). This has been the consistent remedial order as to unions for a long time and appears in every Board decision involving unions. Even with respect to cases involving employees as Charging Parties, the union is required to provide "sufficient copies of the notice for posting by [the employer], if willing, at all places where its notices to employees are customarily posted. *See United Nurses & Allied Prof'ls*, 367 N.L.R.B. No. 94, slip op. at 7 (Mar. 1, 2019).

Our point here is that if the Board's customary and usual remedy is to require the union to provide copies of the Notice so that employers can post or distribute it, fair is fair, and the same should apply to employers who have to post a Notice. They should be required to provide a copy to the union so that the union can either post it on its own bulletin boards, post it in its office, post on the internet, or provide copies to the affected employees. The Board offers no

rationale for this distinction. Absent a rationale, the Court should remand to the Board to explain why it treats unions differently than employers or employees.

3. The Union Seeks A Broad Order Because Of Employer's Proclivity To Violate The Act

The Board is correct that the Union seeks a broad order. *See* Board Br. 44-46, DktEntry 44. The Board identifies the specific broad order that the Union seeks. It can be phrased as follows: "The employer will not refuse to bargain with any union that has been certified as the bargaining representative of a unit of slot technicians because the Union also represents non-guards."

The precise issue in this case is whether the employer can refuse to bargain with a union that represents non-guards over a unit of slot technicians. The Board's brief compellingly and convincingly establishes why the slot technicians are not guards. It's hardly even a close case.

Nonetheless, as the Board points out, this employer has, in every one of its casinos where the Union has been certified, refused to bargain. *See* Board Br. 45, Dkt Entry 44 (citing refusal-to-bargain cases).

The problem here is that the employer will continue in every one of its casinos to refuse to bargain with the Union over a unit of any slot technicians when the Union wins the right to bargain in a Board certified election.

As recognized, in part, by the Board, the problem is that this employer owns or managers some twenty-one casinos. *See* Red Rock Resorts, *Investor Relations: Corporate Profile*, http://redrockresorts.investorroom.com/ (last visited Aug. 19, 2019). More detail can be found in the most recent Red Rock Resorts, Inc. – RRR, Quarterly Report (Form 10-Q) 11 (Aug. 8, 2019), http://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=13050790&type=PDF&symbol=RRR&companyName=Red+Rock+Resorts+Inc.&formT

ype=10-Q&dateFiled=2019-08-08. They file a consolidated balance sheet as reflected in the Quarterly Report.

The Union has organized the slot technicians in four of these twenty-one locations. The problem is that, absent a broad order requiring this employer, Red Rock Resorts, to bargain in any certified unit of slot technicians, the employer will continue on in predictably seventeen more situations simply to challenge the Union's certification.

If there were ever a situation where a union has established a "proclivity" to violate the Act, it is here. The Board recognizes that one of the tests for a broad order is whether "[a] Company has a proclivity to violate the Act or general disregard for employees' rights." *See* Board Br. 45-46, DktEntry 44. Our argument here is that this employer has a proclivity to violate the Act. There is one specific, repeated and predictably continued circumstance: namely, when the Union obtains a certification after winning a Board-conducted election, the employer refuses to bargain, asserting that slot technicians are guards and not employees.

The Board effectively concedes in its Brief that this employer does have such a proclivity. It excuses the broad order on a ground not asserted by the Board in its Decision. It claims that an employer has a legal right to test a union's certification. *See* Board Br. 45, DktEntry 44. We, of course, recognize that the employer may challenge the Union's certification and may use court proceedings to do so. That is only a "legal right" to assert its appellate rights under the Act. 29 U.S.C. § 160(e) or (f). But it doesn't mean that it renders the employer's conduct any more lawful. It simply uses established legal means to delay and challenge the Board's Order. The Board's Order itself is still binding, and the fact of these appeals doesn't affect that. The Board's Order is simply not self-enforcing, so the Board has to seek a Petition for Enforcement to enforce the

Board's Order to compel the employer to comply, under threat of a contempt proceeding. These proceedings do not stay the effect of the Board's Order. 29 U.S.C. § 160(g).

Here, the Board has utterly failed to explain why the employer hasn't shown and professed a proclivity to refuse to bargain every time Local 501 wins an election among slot technicians. The broad order sought is extremely narrow and only deals with future organizing efforts where the Union actually wins the Board election.

The Board has failed to explain why a narrow broad order that this employer, through all of its subsidiaries, must bargain with the Union where the union is certified after a Board conducted election, is unwarranted in the circumstances of this case. The Court should enforce the Board Order as to this casino and remand to the Board for consideration of whether a "narrow," "broad" order limited to the employer's refusal to bargain with the Union (or any union) because it asserts that the slot technicians are guards should be entered.

4. The Employer Should Be Required To Mail Notices To Former Employees

The Union doesn't have the addresses of the former employees. This case will be delayed now for at least two to three years before the employer posts a Board Notice. The only way to reach those employees who are no longer employed is to mail the Notice to those employees. The Board utterly fails to explain why a Notice mailing to former employees is unwarranted. Otherwise, absent that Notice, those employees who were subject to the unfair labor practices may never know that the employer was required to remedy those unfair labor practices.

5. The Board Notice Should Describe The Violation

Finally, we press our issue that the Board Notice should contain some standard language describing the violation that occurred. We suggested that in our Opening Brief. *See* Pet'r's Opening Br. 9, DktEntry 33. In effect, the Notice should simply say something to the effect that the employer unlawfully refused to bargain with the Charging Party. The current Notice only states what the employer is obligated to do for purposes of enforcement of a Board Order. That is, the Board Order contains affirmative language, so that when this Court enforces the Order, the employer is subject to a contempt citation if it fails to comply.

This is not adequate because employees who read the Notice are left totally in the dark as to the nature of the employer's misconduct. They have no explanation that the employer unlawfully refused to bargain with the Charging Party. All that they know is that the employer is obligated in the future to bargain with the Union. The Notice, thus, is inadequate because the employees who are the beneficiaries of the Notice have no idea of what went on and the reason for the Notice posting. We, of course, are aware that the Board Notice, as a standard matter, requires a "QCR" code be available so employees can trace back to the Board Decision. If the Board requires such a QCR code on the Notice, it is not inconsistent to then require a simple statement of what could be found in the lengthier Board Decision, which most employees will not read.

II. CONCLUSION

For the reasons suggested above, this Court should enforce the Board's Order and require the employer to bargain forthwith with the Union. It should

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furthermore remand this matter to the Board for consideration of alternative and additional remedies.

Dated: August 27, 2019

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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/s/ Karen Kempler
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